Supreme Court, U. S.
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75-5426

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

TIMOTHY WESLEY ROBBINS,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH
CAROLINA

Wallace C. Harrelson
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18th Judicial District
State of North Carolina
P. O. Box 2368
Greensboro, North Carolina 27402

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STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on June 16, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 N. C. 483, and is set out in Appendix A hereto, pp. infra.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on June 16, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and is asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> §14-17 (repl. vol. 1969): "Murder in the first and second degree defined; punishment.--A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."1/
>
> §14-18 (repl. vol. 1969): "Punishment for manslaughter.--If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both."
>
> §15-187 (repl. vol. 1975): "Death by administration of lethal gas.--Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."
>
> §15-188 (repl. vol. 1975): "Manner and place of execution.--The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the

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1/ As construed in State v. Waddell, 282 N. C. 431, 194 S.E.2d 19 (1973).

State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on June 16, 1975, affirming petitioner's conviction and sentence of death. Petitioner, Timothy Wesley Robbins, was given a death sentence by the Guilford County Superior Court on May 31, 1974, pursuant to conviction on a count of first degree murder.[2/]

2/ Petitioner is black; the victim was a young white male. Petitioner was also ordered confined to the State Prison for the term of his natural life on a charge of kidnapping, growing out of the same set of facts.

Petitioner's sentence of death was imposed under N. C. Gen. Stat. §14-17 (repl. vol. 1969) (murder) as construed in State v. Waddell, 282 N. C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature subsequently enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974), effective April 8, 1974, which slightly altered the definition of first degree murder. The new first degree murder statute, now codified as N. C. Gen. Stat. §14-17 (1974 supp.), provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

The 1974 legislation, however, is not involved in this case. For the North Carolina Supreme Court has expressly held, with three Justices dissenting, that the enactment of that legislation did not affect death sentences imposed under the anterior State v. Waddell procedure. State v. Williams, 286 N. C. 422, 212 S.E. 2d 113, 121-123 (1975). See, e.g, State v. Wetmore, 287 N.C. 344; State v. Thompson, 287 N.C. 303; State v. Buchanan, 287 N.C. 408.

As noted in Footnote 2 above, Petitioner was sentenced under North Carolina General Statute §14-17 (Repl. Vol. 1969) and subsequent to State v. Waddell, supra. Some twenty days after the decision in the instant case, the North Carolina Supreme Court handed down a decision involving North Carolina General Statute §14-17 (1974 Supp) as set for in Footnote 2 above wherein death is mandatory with no discretion with the jury. In the case of State v. Woodson, 287 N.C. 578 (1975) the Court again considered the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. The Court held:

> "G.S. 14-17, as rewritten on 8 April 1974 by the enactment of N.C. Sess. Laws, ch. 1201, § 1 provides that murder in the first degree 'shall be punished with death.' Defendants contend, however, that capital punishment 'under the laws of North Carolina (would) violate U.S. Const. amend. VIII and amend. XIV, §1, and N.C. Const. art. 1, §§ 19, 27.' In the last three years this Court has several times rejected these contentions. They have been thoroughly considered and further discussion would be merely repetitious. See State v. Waddell, 282 N.C. 431, 194 S. E. 2d 19 (1973); State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974); State v. Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974); State v. Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974); State v. Avery, 286 N.C. 459, 212 S.E. 2d 142 (1975).
>
> "Albeit three members of the Court dissented as to the death penalty in each of the foregoing cases and voted to remand for the imposition of a sentence of life imprisonment; the dissents were not based upon the premise that the death sentence constituted cruel and unusual punishment or that there were any constitutional infirmities in capital punishment per se. On the contrary, the thesis of the dissents was (1) that the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), decided 29 June 1972, had invalidated the death penalty provisions of G.S. 14-17 (and also G.S. 14-21, G.S. 14-52, and G.S. 14-58), enacted in 1949; and (2) that until the statutes which made death the punishment for first-degree murder, first-degree burglary, rape, and arson were rewritten or amended by the General Assembly, this Court could not reinstate capital punishment.
>
> "On 8 April 1974 the General Assembly rewrote G.S. 14-17 and G.S. 14-21 to provide the death sentence for first-degree murder and first-dgree rape. At the same time it rewrote G.S. 14-52 and G.S. 14-58 to provide life imprisonment for burglary in the first degree and arson. As to first-degree murders and first-degree rapes committed after 8 April 1974, by its rewrite of G.S. 14-17 and G.S. 14-21, the General Assembly eliminated the grounds upon which three members of the Court had dissented to the imposition of the death sentence for such crimes committed prior to that date. The felony-murder for which Waxton and Woodson have been convicted was committed on 3 June 1974 - 56 days after the legislature redeclared the public policy of this State with reference to capital punishment.

"Until changed by the General Assembly, or invalidated by the Supreme Court of the United States, that policy must stand." (Emphasis added.)

Therefore, the North Carolina Supreme Court has squarely held under the amended statute, wherein the jury has no discretion, that imposition of the death penalty does not constitute cruel and unusual punishment under the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Defendant, a black man, was tried and convicted on a Bill of Indictment charging him with the murder of a young white man, Bradley Douglas Osborne. He was tried by a judge and jury in the Superior Court of Guilford County in Greensboro, North Carolina during the May 28,1974 Criminal Session of the Superior Court of Guilford County, Greensboro, North Carolina. On May 31, 1974 a judgment was entered imposing the death penalty.

Deceased left his home at approximately one o'clock p.m. on January 19, 1974 to purchase gas (R p 8). He was later seen the same afternoon at an Exxon Service Station at which time the defendant got in the car with the deceased (R p 18). On January 21, 1974, the body of the deceased was found under some brush and tires with a gunshot wound in the left chest area.

Testimony was offered that on the afternoon of January 19,1974, the defendant stopped near where the body was found on Bothwell Street in the City of Greensboro, North Carolina, went into the woods and later emerged running. At that time, the defendant was driving a blue Cavalier automobile which was identified as the automobile driven by the deceased when the defendant got in the car. Further testimony indicated that the defendant asked his cousin if he had a body, what he would do with it. The defendant then took the cousin to an area off Bothwell Street in the City of Greensboro and showed him the body of a man whom he said he had killed.

The State offered, over objection of the defendant, testimony of a detective of the Greensboro Police Department that they located the defendant by getting an address from his arrest record in Charlotte, North Carolina, and that upon doing so immediately thereafter arrested the defendant.

Petitioner was tried and convicted on a Bill of Indictment alleging murder in the first degree. His jury was instructed that it could consider finding him guilty of murder in the first degree or murder in the second degree. The jury returned with a verdict of guilty of murder in the first degree.

Upon conviction, the defendant, through counsel, objected and excepted to the judgment of the court imposing the death sentence and gave Notice of Appeal to the Supreme Court of the State of North Carolina on May 31, 1974.

The Supreme Court of North Carolina with three justices dissenting and by judgment under date of June 16, 1975, affirmed Petitioner's conviction and the imposition of the death sentence on a charge of murder in the first degree. 3/

3/ On June 28, 1975, Chief Justice Susie Sharp stayed execution of the Petitioner's death sentence "pending further orders of this Court" to enable Petitioner to file a Petition for Certiorari.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Upon conviction, the defendant, through his counsel, objected and excepted to the entering of the judgment imposing the death sentence. Upon appeal, the defendant excepted to the entering of the judgment imposing the death sentence which was Petitioner's Assignment of Error XII. He contended that there was error in the Court's entering the judgment imposing the death sentence as being violative of the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States and constituted cruel and unusual punishment. The North Carolina Supreme Court rejected this claim.

> "Finally, defendant contends that imposition of the death penalty is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.
>
> "This assignment has been the subject of final judicial determination in this State unless further review is required by legislative enactment or by the Supreme Court of the United States. State v Stegmann, 286 N.C. 638, 213 S.E. 2d 262 (1975); State v. Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974); State v. Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974); State v. Henderson, N.C. 1, 203 S.E. 2d 10 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974) State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973).

State v. Robbins, 287 N.C. 483

REASONS FOR GRANTING THE WRIT

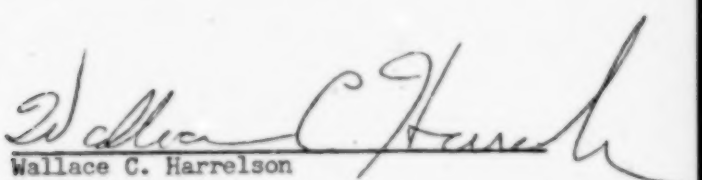
THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at 11-51 (Attached as Appendix B, infra). 4/ On October 29, 1974, this Court granted certiorari to consider a similar question in Fowler v. North Carolina, No. 73-7031.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

4/ While some of the statistics contained in the Dillard "Reason for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of North Carolina are not current in reference to people on Death Row in North Carolina and elsewhere, the basic reasons for granting the Writ in this case are the same as in Dillard.

Appendix A

State v.. Robbins 287 N.C. 483

JUDGMENT
SUPREME COURT OF NORTH CAROLINA

74 CR 19674 74 CR 19771

Spring TERM, 19 75

STATE OF NORTH CAROLINA

vs.

TIMOTHY WESLEY ROBBINS

No. 42 Guilford County.

This cause came on to be argued upon the transcript of the record from the Superior Court Guilford *County:*

Upon consideration whereof, this Court is of opinion that there is no *error in the record and proceedings of said Superior Court.*

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

Honorable J. FRANK HUSKINS *Justice, be certified to the said Superior Court, to the intent that* MM

PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

And it is considered and adjudged further, that the DEFENDANT DO PAY

the costs of the appeal in this Court incurred, to wit, the sum of

****TWENTY-EIGHT AND 80/100**** *dollars ($* 28.80 *),*

and execution issue therefor. Certified to Superior Court this 16th *day of* June *19* 75.

A TRUE COPY

ADRIAN J. NEWTON
Clerk of the Supreme Court.
By: Deputy Clerk

[1-47]

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IN THE SUPREME COURT OF NORTH CAROLINA SPRING TERM 1975

STATE OF NORTH CAROLINA

v No. 42 - Guilford

TIMOTHY WESLEY ROBBINS

On certiorari to the Superior Court of Guilford County to review judgments of Copeland, J., 28 May 1974 Criminal Session, Guilford Superior Court (Greensboro Division).

Defendant was tried on separate bills of indictment, proper in form, charging him with the kidnapping and first degree murder of Bradley Douglas Osborne on 19 January 1974 in Guilford County.

Hugh Douglas Osborne, father of Bradley Douglas Osborne, the deceased, testified that his son Bradley was a student at Wingate College and was on a weekend visit home on Saturday, 19 January 1974. Bradley operated a blue 1973 Gremlin with a black stripe down the side and a stripe across the rear deck. A Wingate College decal was affixed to the rear window of the car. When Bradley came home on this particular Saturday his father put a new 1974 license tag, No. ABF-918, on the Gremlin.

Bradley left his home about 12:30 p.m. to purchase gasoline. At the time, he was wearing a gold Timex watch (State's Exhibit 4). He never returned home, and at 10 o'clock that evening Mr. Osborne reported his son's absence to the police.

Alex Gimpaya testified that he was working at an Exxon filling station between West Market Street and Friendly Road and sold gasoline to the owner of a blue Gremlin about noon on January 19. The customer used a credit card to pay for the gas and signed his name to the receipt. Mr. Gimpaya stated that he wrote the licence number ABF-918 on the receipt.

Mr. Gimpaya further testified that the driver of the Gremlin was a young white male; that while he was pumping the gas, a black man

approached the driver and talked to him and then circled the car and took a seat beside the driver in the front seat while the witness was placing the credit card in the machine to record the sale. This witness identified defendant as the black man he observed on that occasion and as the man who entered the Gremlin while he was working the credit card machine. When the car left the defendant and the owner were in the car together.

Patrolman T. P. Dolinger testified that as a result of a radio communication he went to the home of Hugh Osborne about 10 p.m. on January 19 and was informed that the son Bradley Osborne had been missing since 1 p.m. that day. Patrolman Dolinger put out an alert for the missing person, including information as to the type of vehicle he was driving.

Teresa Louise Martin testified that defendant came to her home on 19 January 1974 between 1:30 and 2:00 p.m. driving a blue 1973 Gremlin and accompanied by his cousin Ronald Stimpson. Defendant invited her to a party that night and she accepted. She got in the Gremlin with defendant and Ronald Stimpson and went to Liberty to see about the party. While riding in the car she observed a tape player and some tapes under the front dash. Upon reaching Liberty she heard one of the boys there ask defendant to let him shoot a gun. She later saw the gun while parked outside Ronald Stimpson's house that night when defendant handed her the gun to hold. She stated that defendant had the gun at the time she left with him and Ronald Stimpson to go to Liberty about 1:30 that afternoon. She also testified that defendant had two watches that day, one of which was gold with an outdated calendar on the watchband which defendant allowed her to wear. She identified this watch as State's Exhibit No. 4. She recalled that on the way back from Liberty that night she, the defendant and Ronald Stimpson stopped on Bothwell Street where defendant went into the woods and later emerged from them running. During the afternoon while defendant and Stimpson were in the Bi-Rite Store and she was alone in the Gremlin, she went through the glove compartment and found a gasoline credit card with the name "Osborne" on it.

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Nadine McCain testified that on 19 January 1974 at about 9 p.m. she accompanied Ronald Stimpson to a party in Liberty and they drove to the party in a blue Gremlin with defendant Timothy Robbins and Teresa Martin. After returning from the party to Greensboro, they stopped at a supper club parking lot where Stimpson and defendant went inside. While they were gone, she and Teresa Martin looked in the glove compartment and found an Exxon card with the name "H. D. Osborne" printed on it. Upon leaving the parking lot, defendant drove to Bothwell Street where he entered the woods and later returned. Defendant was carrying a gun at that time.

Grady Stimpson, a cousin of defendant, testified that on the evening of 19 January he went for a ride with defendant in a blue Gremlin car which defendant was driving. During the drive this witness observed tapes in the car, all of which were made by white singers. He also observed that defendant had a pistol and a shoulder holster with him. Later, back at the Stimpson home, defendant "asked me if I had a body, what would I do with it." The next morning, which was Sunday, defendant came by the home of this witness around 8 a.m. and "asked me again if I had a body, what would I do with it." As the two of them rode around, defendant turned his car on Bothwell Street, which was a dirt road, and said: "I have got something I am going to show you. . . . I done messed up. I done killed a man." The witness then testified that defendant told him he had taken a pair of pants from a store uptown and in trying to get away had asked the man to give him a lift and they became embroiled in an argument and he subsequently killed him. The witness then testified that defendant showed him the body in the ditch off Bothwell Street.

Allen Junior Stimpson, cousin of the defendant, testified that on Saturday morning, 19 January 1974, the defendant showed him a Smith and Wesson .32 caliber pistol and that he rode in the Gremlin which defendant was driving that Saturday night. During the ride he noticed all the tapes in the Gremlin were by white singers and observed on the back window of the car a "Wingate" sticker. This witness further testified that on Sunday morning, January 20, he and defendant took a

trip to Charlotte in the Gremlin, and defendant told him that he had shoplifted a pair of pants while some white boy was watching him; that he offered to pay the white boy to drive him away but the white boy drove him to the police station; that he pulled a pistol on the white boy, moved him over to the passenger side, and drove away; that he later shot the white boy and dragged the body into the woods and later put it in a ditch and covered it with leaves and tires. He said, "That is one less whitey when the revolution come."

On 21 January 1974 at 6 p.m. an unidentified caller whose voice sounded like a black male telephoned the Greensboro Police Department and stated that a body was to be found in the ditch under three tires on the right-hand side of Bothwell Street. This information was put on the air; and Detective Larry Bishop, who heard the radio message, went to Bothwell Street and found the body of a white male under four tires stacked on some bushes. He observed the body and saw there was no wristwatch on it. What appeared to be a gunshot wound was in the left chest. The body was removed by ambulance to Moses Cone Hospital.

Dr. Donald D. Leonard testified that on 22 January 1974 he performed a postmortem examination on the body of Bradley Douglas Osborne; that a bullet entered the left breast and that the muzzle of the gun was less than six inches from the body when the gun was fired; that in his opinion the cause of death was a gunshot wound in the chest with secondary loss of blood.

Captain W. H. Jackson, Greensboro police, testified that he arrested Timothy Robbins, with the aid of Charlotte police officers, at Piedmont Community College on 23 January 1974. At the time of his arrest, defendant had a loaded revolver in his belt, a gold colored Timex watch with an outdated calendar on his arm, and in his pocket a portion of a check (State's Exhibit 18) with the word "Osborne" written on it. On 28 January 1974 the Gremlin automobile was found at 2641 Mayfair Avenue in Charlotte, three and one-half blocks from where the defendant resided. The Greensboro police examined the car and, among other things, found an Exxon credit card receipt for three dollars' worth of gasoline with the name "Bradley Osborne" on it. Hugh B.

Osborne testified that the signature on the credit card receipt was the signature of his son, Bradley Osborne.

The defendant offered no evidence.

The jury convicted defendant of kidnapping and murder in the first degree. He was sentenced to life imprisonment for kidnapping and to death for the murder. He appealed to the Supreme Court assigning errors discussed in the opinion.

RUFUS L. EDMISTEN, Attorney General; WILLIAM W. MELVIN and WILLIAM B. RAY, Assistant Attorneys General, for the State of North Carolina.

WALLACE C. HARRELSON, Public Defender, Eighteenth Judicial District, for defendant appellant.

HUSKINS, Justice:

Captain W. H. Jackson, one of the investigating police officers testified that upon his arrival in Charlotte he went to the Charlotte police to obtain, if possible, the address of Timothy Wesley Robbins. He then stated that the address was obtained "from an arrest record Timothy Robbins." At this point defendant objected and the court, sustaining the objection, instructed the jury "to disregard anything about an arrest record." Denial of defendant's motion for a mistrial is assigned as error, defendant contending that the officer's statement impeached his character prejudicially in violation of the rule proscribing such evidence when a defendant has not taken the stand.

We said in State v Jarrette, 284 N.C. 625, 648, 202 S.E. 2d 721, 735 (1974):

> "It is, of course, the general rule that upon the trial of a criminal charge, the defendant not having taken the stand as a witness, evidence of his bad character is not competent and, for this reason, the State may not introduce evidence showing that he committed an unrelated criminal offense. [Citations omitted.] However, Agent Phelps' statement inferring that the defendant had escaped from prison was not responsive to the question propounded to him by the Solicitor. Immediately, upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for mistrial."

In State v McKethan, 269 N.C. 81, 152 S.E. 2d 341 (1967), defendant was on trial for rape and kidnapping. Defense counsel asked a State's witness if he knew the defendant prior to this incident. The witness replied, "Yes, sir. I have had David for other sex offenses."

Upon defendant's objection and motion to strike, the court instructed the jurors not to consider the statement, to erase it from their minds and not to let it influence their verdict in any way. We hold the occurrence afforded no grounds for a mistrial.

Captain Jackson's inadvertant reference to defendant's arrest record was incompetent. We hold, however, that the action of the court in sustaining defendant's objection and prompt instruction to the jury to disregard the statement sufficed to remove any possibility of prejudice to defendant. "[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." State v Ray, 212 N.C. 725, 194 S.E. 482 (1938); accord, State v Self, 280 N.C. 665, 187 S.E. 2d 93 (1972); State v Moore, 276 N.C. 142, 171 S.E. 2d 453 (1970). "Ordinarily where the evidence is withdrawn no error is committed." State v Strickland, 229 N.C. 201, 49 S.E. 2d 469 (1948).

A look at the record reveals that defendant's guilt of kidnapping and murder is overwhelmingly shown by competent, untainted evidence. All the evidence and every surrounding circumstance points unerringly to his guilt, and there is no reason to believe that another trial would produce a different result. In some cases, and this is one of them, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of an erroneous statement is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper evidence is harmless error. Schneble v Florida, 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); State v Crowder, 285 N.C. 42, 203 S.E. 2d 38 (1974). Substantial factual differences distinguish State v Aycoth, 270 N.C. 270, 154 S.E. 2d 59 (1967), relied on by defendant. In our view, the minds of the jurors in this case would not have found the State's case significantly less persuasive had Officer Jackson never referred to an arrest record. Hence, no prejudice resulted. This accords with consistent decisions of this Court that technically incompetent evidence is harmless unless it is made to

appear that defendant was prejudiced thereby and that a different resu likely would have ensued had the evidence been excluded. State v Barbour, 278 N.C. 449, 180 S.E. 2d 115 (1971), cert. denied 404 U.S. 1023 30 L.Ed. 2d 673, 92 S.Ct. 699 (1972); State v Williams, 275 N.C. 77, 165 S.E. 2d 481 (1969). "Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial." State v Bovender, 233 N.C. 683, 65 S.E. 2d 323 (1951). This assignment of error is overruled.

Defendant's second assignment of error relates to the introduction, over objection, of a portion of a check (State's Exhibit 16). Captain Jackson of the Greensboro Police Department testified without objection that State's Exhibit 16 was removed from the pocket of the defendant Timothy Robbins in the police department in Charlotte on the night of January 24. This check, or portion of a check, is dated January 18, 1974, has the word "Csborne" showing on the payee line followed by the sum "$35.00." Only the word "five" shows on the line below followed by the printed word "Dollars." The check apparently was drawn on The Stage Door Set and bears the purported signatures of Thomas N. Vance and Donald Martin. No first name or initial of the payee is visible on this portion of the check, and there is no indication that the check was endorsed by the deceased or anyone else. Defendant contends that this paper writing was never authenticated and its genuineness and its execution were never proven prior to its introduction. He asserts the check was therefore erroneously received into evidence and that its reception was highly prejudicial.

Every circumstance calculated to throw any light upon the crime charged is admissible in criminal cases. State v Hamilton, 264 N.C. 277, 141 S.E. 2d 506 (1965), cert. denied 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1938 (1966); State v Payne, 213 N.C. 719, 197 S.E. 573 (1938). Articles shown by the evidence to have been used in the commission of a crime are competent and properly admitted into evidence. State v Stroud, 254 N.C. 765, 119 S.E. 2d 907 (1961). "So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal

trials." 1 Stansbury, North Carolina Evidence § 113 (Brandis rev. 1973). Accord, State v Bass, 249 N.C. 209, 105 S.E. 2d 645 (1958); State v Harris, 222 N.C. 157, 22 S.E. 2d 229 (1942).

Here, there is evidence tending to show that the last name of the deceased is "Osborne"; that this partially mutilated check with the name "Osborne" on the payee line was found in defendant's pocket when he was arrested; that defendant was also wearing a gold Timex watch (State's Exhibit 4) which he showed to Allen Junior Stimpson and stated that he took it "off the boy" together with a billfold containing $30.00 in money. Thus there is evidence tending to show that State's Exhibit 16 has a relevant connection with the case and is competent evidence. It tends to show some contact between the defendant and the deceased and to identify the defendant as the perpetrator of the crime charged. Moreover, it corroborates the testimo of the police officers. Rules of law relating to authentication, genuineness and execution of paper writings have no pertinence in this context. This assignment of error is overruled.

Defendant's next assignment of error is based on Exceptions Nos. 15 through 29. One of these exceptions appears in each instance where the court in its charge, following recapitulation of the testimony of each State's witness, stated: "That is what the evidence of this witness tends to show for the State and for the defendant. What it does show is for you, the jury, to say and to determine." (Emphasis added.) Defendant argues that since he offered no evidence the charge "in effect held the defendant out to the jury as ratifying and confirming almost the entire evidence put on by the State." Moreover, he contends that repetition of the phrase fifteen times "unavoidably and unalterably invaded the province of the jury, and in effect amounted to an expression of opinion on the part of the judge, for which a new trial must be ordered." We now examine the validity of this assignme

The main purpose of the court's charge to the jury is to clari the issues, eliminate extraneous matters, and apply the law to the different factual aspects arising upon the evidence. State v Jackson, 228 N.C. 656, 46 S.E. 2d 858 (1948). So long as the judge charges

correctly on the applicable principles of law and states the evidenc plainly and fairly without expressing an opinion thereon, he has wid discretion in presenting the issues to the jury and is not bound by any stereotyped forms of instruction in doing so. State v Mundy, 26 N.C. 528, 144 S.E. 2d 572 (1965); State v Biggs, 224 N.C. 722, 32 S. 2d 352 (1944); State v Howard, 223 N.C. 291, 22 S.E. 2d 917 (1942).

Here, defendant offered no evidence but relied upon the legal presumption of innocence and the weakness of the State's case. The presumption of innocence goes with him throughout the trial and is not overcome by his failure to testify in his own behalf. "He is no required to show his innocence. The burden is on the State to prove his guilt beyond a reasonable doubt." State v Spivey, 198 N.C. 655, 153 S.E. 255 (1930). And a reasonable doubt may arise from the evidence offered against him, or from a lack of evidence, or from its deficiency. State v Hammonds, 241 N.C. 226, 85 S.E. 2d 133 (1954); State v Braxton, 230 N.C. 312, 52 S.E. 2d 895 (1949); State v Tyndall 230 N.C. 174, 52 S.E. 2d 272 (1949).

When the foregoing legal principles are applied to the words in the charge assigned as error, it is apparent that the language complained of is not prejudicial and did not amount to an expression of an opinion in violation of G.S. 1-180. "The charge of the court must be read as a whole . . ., in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . ." State v Wilson, 176 N.C. 751, 97 S.E. 496 (1918). Although the instruction in question here is not a model to be followed, we perceive nothing in it which would prejudice a mind of ordinary firmness and intelligence. When construed contextually, the charge as a whole is correct. It presents the law fairly and clearly to the jury and applies it correctly to the different factual aspects of the evidence. Furthermore, "it is a general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction;

otherwise they are deemed to have been waived and will not be considered on appeal." State v Gaines, 283 N.C. 33, 194 S.E. 2d 839 (1973). This assignment lacks merit and is overruled.

Finally, defendant contends that imposition of the death penalt is cruel and unusual punishment prohibited by the Eighth and Fourteent Amendments to the Constitution of the United States.

This assignment has been the subject of final judicial determin tion in this State unless further review is required by legislative enactment or by the Supreme Court of the United States. State v Stegmann, 286 N.C. 638, 213 S.E. 2d 282 (1975); State v Honeycutt, 285 N.C 174, 203 S.E. 2d 844 (1974); State v Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974); State v Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); State Jarretts, 284 N.C. 625, 202 S.E. 2d 721 (1974); State v Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973).

Assignments relating to nonsuit and to the signing of the judgments are formal, requiring no discussion, and are overruled.

Examination of the entire record discloses a senseless killing without provocation and a fair trial free from prejudicial error. The verdicts and judgments must therefore be upheld.

NO ERROR.

Justice COPELAND did not participate in the hearing or decision of this case.

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF SOUTH CAROLINA
By Mrs Peggy M. Byrd
DEPUTY CLERK
16th June 75

[11-A7]

Appendix B

Pp 11-51, Petition for Writ of Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (Filed June 11, 1974).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This case and four contemporary cases[6/] present the question of the constitutionality of the death penalty as that penalty was resurrected in the State, of North Carolina by a four-to-three vote of the North Carolina Supreme Court following Furman v. Georgia, 408 U.S. 238 (1972). A brief review of post-Furman developments relating to the death penalty in the United States generally and in North Carolina particularly sets the question in perspective.

The nearly universal response of state courts in obedience to Furman was to hold that death sentences could no longer be meted out under the capital punishment laws which had been in effect prior to June 29, 1972, and which the Furman decision

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6 / Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O. T. 1973, No. 73-

of that date declared unconstitutional.[7] Subsequently, statutes

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7/ See, e.g., United States v. Lee, 489 F.2d 1242 (CA DC 1972); United States v. Woods, 484 F.2d 127, 138 (CA4 1973) ("Since the decision in Furman v. Georgia, ... the statute under which defendant was convicted of first degree murder, 18 U.S.C. §111, provides as the only possible sentence imprisonment for life" at 138); United States v. McNally, 485 F.2d 398 (CA8 1973); Hubbard v. State, 290 Ala. 118, 274 So.2d 293 (1973) ("There is no question that Furman has, as of now, eliminated the death penalty from our statute. The elimination of the death penalty does not destroy the entire statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment." 274 So.2d at 300); State v. Endreson, 109 Ariz. 117, 506 P.2d 248 (1973) ("In view of [the Furman ruling] we hold that the death penalty provisions of [the Arizona murder statute] are unconstitutional." 506 P.2d at 254); O'Neal v. State, 253 Ark. 574, 487 S.W. 2d 618 (1972); People v. Murphy, 8 Cal. 3d 369, 105 Cal. Rptr. 138, 503 P.2d 594 (1972); State v. Aillon, ___Conn.___, 295 A.2d 666 (1972); Anderson, et al., v. State, 267 So. 2d 8 (Fla. 1972); Sullivan et al. v. State, 229 Ga. 731, 194 S.E. 2d 411 (1972); People v. Speck, 52 Ill. 2d 234, 287 N.E. 2d 609 (1972) ("The Supreme Court of the United States has now held that a defendant could not be validly sentenced to death under [pre-Furman Illinois capital statutes]." 287 N.E.2d at 700; Adams v. State, ___Ind.___, 284 N.E.2d 757 (1972); State v. Randol, 212 Kan. 461, 513 P.2d 248 (1973) (". . .court is of the opinion that the death penalty provision of our present statute is constitutionally impermissible. The 1972 Legislature of Kansas considered but failed to enact amendatory legislation." 513 P.2d at 256); Caine and McIntosh v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), cert. den. 414 U.S. 876; State v. Flood, 263 La. 700, 269 So.2d 212 (1972) ("the Furman case has eliminated 'capital offenses' in Louisiana." 269 So.2d at 214); Bartholmey v. State, 267 Md. 175, 297 A.2d 696 (1972); Commonwealth v. LeBlanc, ___Mass.___, 299 N.E.2d 719 (1973); Capler v. State, ___Miss.___, 268 So. 2d 338 (1972) (". . . the harsher penalty of death may not be lawfully imposed. The remaining part of the statute is complete. . . .We hold that because of Furman v. Georgia, the death penalty cannot be inflicted, that the remainder of the statute is valid and the only other punishment for murder is life imprisonment." 268 So.2d at 339-40); State v. Scott, 491 S.W.2d 514 (Mo. 1973) ("The sole and only punishment for first degree murder in this state is now life imprisonment." at 521); State v. Alvarez, No. 27435, Dist. Ct. Lancaster Cty., Neb. Oct. 4, 1972; Walker v. State, 88 Nev. 539, 501 P.2d 651 (1972); State v. Martineau and Nelson, 112 N.H. 278, 293 A.2d 766 (1972); People v. Fitzpatrick, 32 N.Y. 2d 499, 300 N.E. 2d 139 (1973), cert. den. 38 L.Ed. 2d 338, 94 S.C. 554 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972) ("Under [the Furman] holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional [with possible exceptions not relevant here]." 285 N.E. 2d at 755); Pate v. State, 507 P.2d 915 (Okla. 1973) ("After an exhaustive study of the [Furman] opinions . . . this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as

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were enacted in slightly more than half the States (and by the federal government), authorizing the use of the punishment of death in differingly defined categories of cases.[8] The statutes vary widely in their terms and forms, and consequently vary

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7/ cont'd

the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia," at 916); Commonwealth v. Bradley, 449 Pa. 19, 295 A.2d 842 (1972); Hunter, et al. v. State, ___ Tenn. ___, 496 S.W.2d 900 (1972). ("The effect of [Furman] . . . is to render void the penalty of death as it exists under the statutes of Tennessee." 496 S.W.2d at 902); Lopez v. State, 500 S.W.2d 844 (Tex. Crim. 1973) (". . . we find the inescapable conclusion to be that the holding in Furman and Branch rendered it impermissible under the Constitution of the United States to impose the death penalty under our ten existing statutes." At 846); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); State v. Vidal, 82 Wash.2d 94, 508 P.2d 158 (1973) ("The recent case of Furman v. Georgia . . . has the effect of preventing the imposition of the death penalty under the existing statutes of the State of Washington." 508 P.2d at 162).

8/ Some of these new statutes provide that a court or jury must make a separate determination as to whether a defendant should be sentenced to life or death independently of its finding the defendant guilty of a capital crime; conviction of a particular offense does not, therefore, necessarily result in a death sentence. Some of these laws provide a single verdict proceeding, in which the trial judge or jury must return a general verdict finding a defendant guilty of a capital degree of the offense. Del. Code, tit. 11, § 636 (1974), as amended by Del. H.B. No. 429, 127th Gen. Ass. (1974); N.H. Rev. Stat. Ann. § 630:1(I) (1973), as amended by N.H. S.B. 27, Chap. 34, Acts of 1974, N.H. Gen. Ct.; N.Mex. Stat. §§ 40A-2-1, 40A-2-1(A), 40A-29-2 (1974); N.C. Gen. Stat. §§ 14-17, 14-21, as amended by S.B. 157, Chap. 1201, 1973 Sess. Laws (2nd Sess. 1974); Tenn. Code Ann. §§ 39-2402 (as amended by Pub. Chap. 462, Tenn. Laws 1974), 39-3702 (as amended by Pub. Chap. 461, Tenn. Laws 1974) (1974). Others of these statutes provide a unitary proceeding where a jury must return a verdict finding special facts to justify the death sentence. Ind. Code § 10-3401 (1974); Ky. Rev. Stat. Chap. 507, as amended by Ky. H.B. No. 232, Reg. Sess. 1974; La. Rev. Stat. §§ 14:30, 14:42, 14:44, 14:113 (1974); La. Code

somewhat in the questions they present regarding their compliance with Furman and with the Eighth and Fourteenth Amendments to

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8/ cont'd

Crim. Proc., Art. 557, 598, 817 (1974); Miss. Code §§ 97-3-19, 97-3-65 (1974), as amended by Miss. S.B. No. 2341, Reg. Sess. 1974; Mont. Code §§ 94-5-102, 94-5-103, 94-5-105, 94-5-304 (as amended by Mont. H.B. No. 643, Mont. Gen. Laws 1974) (1974); Nev. Code § 200.030 (1974); Okla. Stat., tit. 21, §§ 701.1, 701.3, 701.6 (1974); Wyo. Stat. § 6-54 (1974). Among the new laws which provide a bifurcated proceeding to make this separate determination as to sentence, some allow imposition of sentence without any particular finding identified by the legislature as a prerequisite for imposing either a sentence of death or life imprisonment. Ga. Code § 27-2534.1 (1973), as amended by No. 74, Ga. 1973 Sess. Laws at 162-172; Utah Crim. Code §§ 76-3-206, 76-5-202, 76-5-302, 76-3-207 (1974). Others of these bifurcated trial statutes require the imposition of a death sentence when a certain finding is made at the sentencing proceeding; some identify a particular circumstance which justifies imposition of a death sentence. Cal. Penal Code §§ 190, 190.1, 190.2, 209, 219, 4500 (1974); Ill. Code §§ 5-8-1a, 9-1 (1974); Tex. Pen. Code § 19.02 (1974); Tex. Code Crim. Proc., Art. 37.071 (1974); others identify such circumstances but provide that such "aggravating" circumstances may be counterbalanced by the finding of "mitigating" circumstances in some unspecified fashion, Ariz. Rev. Stat. §§ 13-452 - 13-454 (1974; Ark. Code §§ 41-4702 - 41-4713 Fla. Stat. §§ 782.01, 794.01, 792.141 (1974); Neb. Code §§ 28-401, 29-2522, 29-2523, 29-2524 (1974); still others provide formulae for the weighting of "aggravating" against "mitigating" circumstances to determine which defendants shall be sentenced to death. Conn. Gen. Stat. § 53a-45 (1974); Ohio Rev. Code §§ 2929.03, 2929.04 (1974); Pa. Stat., tit. 18, § 4701 (1974), as amended by Pa. H.B. 1060, Act. 46, 1974 Sess.

Another group of statutes provides for the imposition of a death sentence by operation of law pursuant to a jury's or trial judge's conviction of a certain crime. Idaho Code §§ 18-4003, 18-4004 (1974); R.I. Code § 11-23-2 (1974); New York: Ass. Bill 11474, 1974 Sess. Laws.

The following States have not enacted legislation authorizing the death penalty since Furman: Alaska, Alabama, Colorado, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, North Dakota, Oregon, South Carolina, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Vermont.

the Constitution.[9] It is a fair although gross generalization that, in most States, the new statutes authorize capital punishment for a narrower category of offenses than those that were punishable by death in the same States before Furman. Of the 103 men and women who have been sentenced to die in the United States since June 29, 1972, and who are presently on death row,[10] roughly two-thirds were condemned under the new post-Furman statutes.

Virtually all of the remainder[11] -- 31 men and women, to be

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9/ The first decisions by the highest court of any State affirming death sentences imposed under one of the new post-Furman statutes were handed down in a Georgia murder case, State v. House, Ga. Sup. Ct. No. 28678 (April 4, 1974) (rehearing denied, April 25, 1974); and in a Georgia rape case, State v. Eberheart, Ga. Sup. Ct. No. 28776 (April 30, 1974) (rehearing denied, May 21, 1974). Counsel for Mr. House and Mr. Eberheart (who include some of the counsel for petitioner Dillard) are presently preparing to seek review by this Court of the Georgia Supreme Court's decisions.

10/ We exclude from this computation a number of persons sentenced to death since Furman whose convictions or death sentences have been reversed or vacated on appeal. The 99 figure represents persons presently committed under unreversed and unvacated sentences of death.

11/ Seven persons have been sentenced to die since Furman under the provisions of pre-Furman statutes. The cases of six of these persons (in Massachusetts, Montana, Pennsylvania, and South Carolina) are described in note 14, infra. The remaining case arises under a Virginia statute which the Virginia Supreme Court held distinguishable from the statutes invalidated in Furman. State v. Jefferson, Va. S.C., No. 730370, decided April 22, 1974. A petition for rehearing is presently pending in Jefferson. Should it be denied, counsel for Mr. Jefferson (who are associated with some of the counsel for petitioner Dillard) anticipate that review will be sought in this Court.

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exact -- are on death row in North Carolina, where post-Furman developments took a markedly different turn by the margin of a single vote on the North Carolina Supreme Court in the case of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). Prior to 1947, North Carolina law had required the imposition of the death penalty upon all convictions for the crimes of first-degree murder, rape, first degree burglary, and arson. By enactments of 1947 and 1949, the North Carolina General Assembly provided that, in the case of convictions for any of these four offenses, the jury might spare the defendant's life by a recommendation of life imprisonment. 12/ An unanimous Supreme Court of North Carolina

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12/ The jury was given the power to recommend life imprisonment in arson and burglary cases in 1947, and in murder and rape cases in 1949. We have found no legislative history dealing directly with the 1947 enactment.

The limited legislative history available for the 1949 North Carolina legislative action reflects a clear and considered abandonment of a general mandatory death penalty. As noted in State v. Pugh, 250 N.C. 278, 168 S.E.2d 649, 642 (concurring opinion of Denny, J.), the 1947 General Assembly created a Special Commission for the Improvement of the Administration of Justice. That Commission recommended, inter alia:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder, because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

[footnote continued]

concluded in Waddell that, as amended in 1947 and 1949 and operative for nearly a quarter-century between 1949 and 1972, the North Carolina statutes inflicting capital punishment for first degree murder, rape, first degree burglary and arson were unconstitutional under Furman. Three Justices of the court therefore would have held that the death penalties provided by North Carolina law on the dates of the Furman and Waddell decisions were constitutionally unenforceable then and thenceforth until (at the least) the enactment of new capital punishment legislation by the General Assembly. But a majority of four Justices

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12/ cont'd.

POPULAR GOVERNMENT (January 1949) (published by the Institute of Government, University of North Carolina, Chapel Hill, North Carolina), p. 13. The North Carolina Supreme Court commented on the legislative intent indicated by the 1949 measures in State v. McMillan, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning, - a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison . . . . No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right."

held that the only portion of North Carolina law invalidated by Furman was the 1949 "recommendation" provision, with the result that (prospectively from the January 18, 1973, date of the Waddell decision) North Carolina law reverted to its pre-1949 state:

> "[T]he effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death." (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19, 28-29(1973).)

Under these procedures, petitioner and the other 30 persons now inhabiting North Carolina's death row were sentenced to die between the date of Waddell and the date of the enactment of a new North Carolina death penalty statute on April 8, 1974. 13/

The question presented here is the federal constitutionality of death sentences imposed in North Carolina pursuant to the Waddell procedures and without new legislative authorization after Furman. Most immediately, that question is potentially decisive of the lives of the 31 condemned inmates in the State

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13/ See note 2, supra.

which now has the largest death row population in the Nation. It may also have direct implications for death sentencing in four other States.[14/] Depending, of course, upon the grounds on which this Court elects to consider the question, it may or it may not have implications -- of narrower or broader scope -- for the death penalties enacted by post-Furman legislation.

14/ The only other state appellate court that has dealt with Furman in the fashion of Waddell is the Supreme Court of Delaware, in State v. Dickerson, __ Del. __, 298 A.2d 761 (1972). The Dickerson opinion was announced prospectively on November 1, 1972. No capital convictions were returned in the State of Delaware between that date and the dates upon which, successively, (1) a new criminal code enacted before Furman but effective July 1, 1973, came into effect, repealing the statutory provisions upon which Dickerson rested, and (2) the Delaware legislature enacted a post-Furman statute effective March 29, 1974. There is presently pending litigation in the Delaware Supreme Court raising the issues of the effects upon Dickerson of the supervening code and post-Furman enactment. State v. Smith, Del. S.C. No. 52,1974.

Trial courts in Massachusetts and South Carolina have imposed death penalties after Furman under the purported authorization of pre-Furman statutes and in apparent reliance upon the rationale of Waddell and Dickerson. Commonwealth v. Brown, Clinkscales, and Johnson, Superior Ct., Suffolk Co. (Mass.), Nos. 74502-3-4 and 74516-17-18; State v. Speights, Ct. of Gen. Sess., Florence Co. (S.C.), No. 5053. It is also possible that three post-Furman death sentences imposed in Montana and Pennsylvania under pre-Furman legislation rest upon the same rationale, although the trial judges' reasoning in these cases more likely stands upon other grounds. State v. Rhodes & Shields, Mont. S. Ct. Nos. 12596 and 12597; Commonwealth v. Martin, Pa. Sup. Ct., No. 44 (March Term, 1974). All of the cases just mentioned are presently pending in the respective Supreme Courts of the States in which they arise.

A. Evasion of the Furman Decision

The narrowest issue raised is simply whether the majority of the North Carolina Supreme Court in Waddell read Furman correctly and applied Furman permissibly in holding that Furman invalidated only the 1949 "recommendation" provision of North Carolina law, rather than the underlying death penalty. As tortured as that holding may seem -- being the lethal equivalent of a state-court holding that Brown v. Board of Education required the closing of the public schools instead of their desegregation -- it is not entirely unprecedented. Twice in recent years this Court has corrected similar manipulations of state-law severability doctrines designed to emasculate a constitutional decision of the Court forbidding the imposition and carrying out of impermissible death sentences. Funicello v. New Jersey, 403 U.S. 948 (1971)(alternative ground); Thomas v. Leeke, 403 U.S. 948 (1971).

These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading non vult (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in United States v. Jackson, 390 U.S. 570 (1968), and Pope v. United States, 392 U.S. 651 (1968). The South Carolina Supreme Court in Thomas recognized the incompatibility of its statutory guilty-plea scheme with the constitutional principle of Jackson, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme

Court attempted to distinguish Jackson but held alternatively that, if Jackson did invalidate New Jersey's non vult provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court declined the gambit.

What a majority of the North Carolina Supreme Court has done here, albeit by a somewhat different mechanism, is much the same thing. During a quarter of a century between enactment of the legislative "recommendation" procedure in 1949 and enactment of a new post-Furman death-sentencing procedure by the North Carolina legislature in 1974, countless men died and others guilty of identical crimes were spared death pursuant to an arbitrary selective procedure which -- as the North Carolina Supreme Court itself has concluded -- falls unmistakably within the ban of Furman. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate manipulation of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-Furman North Carolina statutes authorizing capital

punishment would be arbitrary and selective, and hence a constitutionally cruel and unusual punishment, in the wake of Furman. Thirty-one more persons are thus tossed into the death column as opposed to the now closed and hence forgotten column of the spared, upon the capital punishment ledgers of North Carolina since 1949. Whether the particular state-law contrivance by which that calculation is accomplished makes the deaths of these 31 persons any less selective, arbitrary, cruel and unusual in federal constitutional contemplation is, we suggest, an issue that this Court should address, if its Furman decision is to have the vitality and respect that the Supremacy Clause rightly commands.

B. The Lawless Imposition Of Death Penalties

The second issue presented is whether the re-institution of the death penalty which the North Carolina Supreme Court achieved by amputating life from that State's life-or-death sentencing statutes is a result that can constitutionally be effected by any device of judicial decision wholly ungoverned and undirected by legislative action. It is, of course, generally true that the federal Constitution is not concerned with how a State divides it law-making functions between its judicial and legislative organs. But that generalization cannot be permitted to sweep away the fundamental concerns of the Eighth and Fourteenth Amendments against judicial imposition of harsh criminal punishments unauthorized by law and in excess of the penalties provided by "the valid laws of the land." Giaccio v. Pennsylvania, 382 U. S. 399, 403 (1966).

Recent scholarship has underscored that the English Bill of Rights, from which the Eighth Amendment's prohibition of "cruel and unusual punishments" was derived, was in large measure directed toward preventing the exaction of unauthorized penalties.[15/] That

15/ Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). It is true that Granucci also finds that the American Framers imperfectly understood the English background of the cruel-and-unusual-punishment clause, and that they themselves were principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to diminish the scope of a guarantee that they believed basic to their traditions (see 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (1863)), or to reject protections of the citizen long preserved by their English heritage. Indeed, as early as 1635, American settlers had "conceived great danger . . . in regard that . . . magistrates, for want of positive laws, in many cases, might proceed according to their discretions," and had therefore agreed "that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws." WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686, at 5 (1889). It should hardly be surprising that the cruel-and-unusual-punishment clause, like many of the other basic guarantees of the Bill of Rights, is woven of several strands and protects against more than a single evil.

function remains a vital office of the cruel-and-unusual punishment clause today,[16] although it certainly is not the exclusive focus of the clause.[17] As this Court pointed out in Weems v. United States, 217 U. S. 349, 376 (1909), the Framers were eager to assure "that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs." The conjunction of the words "cruel" and "unusual" in the Eighth Amendment can hardly be regarded as accidental if one appreciates the relationship, within a basically popular and democratic governmental structure, of the dangers of lawlessness, irregularity, arbitrary selectivity,[18] and cruelty.[19] For, in such a structure, harsh and unsufferable criminal penalties are most likely to spring from devices that evade the rule of law or subvert the ordinary protections afforded by its regularity and generality.

Due Process of Law, too, insures against the imposition of criminal sanctions that are not decreed in strict accordance with the regular course of law.

> "[T]he terms 'due process of law' . . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.'" Dent v. West Virginia, 129 U. S. 114, 123 (1888).

16/ See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 STAN L. REV. 838, 855-856 (1972).

17/ See Weems v. United States, 217 U. S. 359 (1909); Robinson v. California, 370 U. S. 660 (1962); Furman v. Georgia, 408 U. S. 238 (1972). And see note 15, supra.

18/ See section I(C), pp. 28-44, infra.

19/ This relationship is developed in Brief for Petitioner, Aikens v. California, 406 U. S. 813 (1972) [No. 68-5027], pp. 13-27, 39-56.

"The essence of [the] . . . . principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules.[20] So rudimentary has this principle been to American notions of Due Process, that unauthorized criminal penalties have rarely been imposed in this country;[21] but, on the rare occasions when they have been examined by this Court, the Court has treated them as self-evidently void to the extent that they exceeded what was authorized by valid legislation. Ex parte Lange, 83 U. S. 163 (1874); Ex parte Mills, 135 U. S. 263 (1890); In re Bonner, 151 U. S. 243 (1894). In this century, the root principle has been most commonly observed in its offshoots: the vagueness doctrine as applied to penalties, Giaccio v. Pennsylvania, 382 U. S. 399 (1966); the lenity principle, Ladner v. United States, 358 U. S. 169 (1958);[22] and this Court's

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20/ HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 26 (2d ed. 1960).

21/ But see Ashton v. Kentucky, 384 U. S. 195 (1966).

22/ "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. [Citations omitted.] . . . 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. at 177-78.

adamant refusal to undertake either the judicial fashioning of criminal punishments, United States v. Evans, 333 U. S. 483 (1948), or the judicial fashioning of procedures for the imposition of criminal punishments, United States v. Jackson, 390 U. S. 570 (1968).[23] Under the rule of law guaranteed by Due Process, the creation of criminal sanctions is, quite simply, "no part of [judges'] . . . duties." United States v. Reese, 92 U. S. 214, 221 (1875).

The question here is whether the North Carolina Supreme Court has infringed that principle, or whether the state-law characterization of what was done in Waddell as a mere application of severability doctrine saves palpable judicial promulgation of the harshest penalty known to mankind[24] from the constitutional

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23/ "It is one thing to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality." Id. at 580.

24/ See the opinion of Mr. Justice Sharp, dissenting in State v. Waddell, 282 N.C. 431, ___, 194 S.E.2d 19, 48 (1973):

> "This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary 'from death or life imprisonment in the discretion of the jury to mandatory death.'"

charge of lawlessness. The question is not, of course, whether four or three Justices of the North Carolina Supreme Court more nearly guessed what the North Carolina legislature might have wanted in the wake of Furman, in light of the fact that its last pronouncement on the subject -- a quarter-century old -- was long sealed together with the irremediable fates of those who had been chosen to live or to die under the discretionary sentencing regime for which it then unmistakably opted.[25/] Rather the question is whether judicial fiat, with nothing more than the profession of that kind of guesswork to connect it with the regular and accepted method of providing by law for the punishment of crimes, can withstand scrutiny under federal constitutional guarantees designed as limitations upon the lawless exaction of overbearing and unauthorized criminal penalties.

25/ State v. Waddell, 282 N.C. 431, ____, 194 S.E. 2d 19, 26 (1973); State v. Mathis, 236 N.C. 508, 53 S.E.2d 666 (1949); and see note 12, supra.

C. The Perpetuation of Arbitrary Discretion in the Selection of Those Who Must Die.

The third issue presented is whether the capital trial procedure approved for North Carolina by the Waddell decision violates Furman's prohibition of arbitrary selectivity in the administration of the death penalty. Although the prevailing opinions in Furman differ somewhat regarding the questions left unanswered by the Furman holding, they all condemn at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic selective processes.[26] The form of those

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26/ The concurring Furman opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se, regardless of the presence or absence of discretion in the procedural system whereby it is applied.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional," 408 U.S. at 257, but held the death sentences under review in Furman and companion cases unconstitutional under the Eighth and Fourteenth Amendments because they were the result of a procedure which discriminated against certain defendants upon the basis of "race, religion, wealth, social position [and] class" and which "[gave] room for the play of such prejudices." 408 U.S. at 242.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question [whether "the infliction of the death penalty is constitutionally impermissible in all circumstances"], 408 U.S. at 306, since he found that the death sentences under review were "wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore in violation of the Eighth and Fourteenth Amendments. "[O]f all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote omitted).

Mr. Justice White declined to consider the question of whether "the death penalty is unconstitutional per se," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

processes can hardly be thought constitutionally dispositive. See Commonwealth v. A Juvenile, 1973 Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[27] What is important is their result: a lawless and capricious dispensation of life and death, in which death sentences are "freakishly imposed." Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring).

In considering whether the Waddell procedures comply with Furman or whether the North Carolina Supreme Court has merely displaced the focus, lowered the visibility, diffused the responsibility, and thereby increased the predictable arbitrariness and discrimination of persisting discretionary processes for the administration of the death penalty,[28] this Court will

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27/ In this case, the Supreme Judicial Court of Massachusetts ruled that Furman invalidated a death sentence under a "mandatory" death penalty statute, if arbitrary procedures made it possible for some defendants to escape being subjected to the extreme punishment. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was "mandatory" under Mass. Gen. Laws Ann. c.265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since Furman invalidated "discretionary imposition of the death sentence," 300 N.E. 2d at 442 (emphasis in original), regardless of where in the process this discretion was lodged.

28/ The discretion which is concealed but inevitable in a purportedly "mandatory" death-sentencing system is likely to be influenced by impermissible considerations to at least as great an extent as the visible discretion that Furman found unconstitutional. North Carolina's experience with a "mandatory" statute prior to 1949 reflects this point. Between 1910 and 1949, 75% of all persons received under sentence of death were non-white; between 1950 and 1972, 63% of those so received were non-white. Similarly, 80% of persons executed under the pre-1949 "mandatory" system were non-white; 73% of executions under the post-1949 "discretionary" system were of non-whites. (Data compiled from BISHIR, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3, (North Carolina Office of Corrections, September

want to consider the following characteristics, among others, of North Carolina law and practice:

28/ cont'd.

1973)). It appears that under the "mandatory" system created by the Waddell decision similar forces are at work: as of June 1, 1974, 24 of the 34 defendants condemned to die for crimes committed between January 18, 1973 (the date of Waddell) and April 8, 1974 (the effective date of the new North Carolina capital punishment statute), or 71%, are non-white, approximately the percentage of those condemned to die who were non-white under the pre-Furman "mandatory" system. Death sentences have been affirmed or imposed under the Waddell procedures in the following cases:

State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Crowder, 285 N.C. 42, 203 S.E.2d 38 (1974); State v. Dillard, 285 N.C. 72, 203 S.E.2d 6 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd __ N.C. __, 203 S.E. 2d 786 (April 10, 1974); State v. Monk, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974); State v. Britt, Robeson County Superior Ct., No. 73-Cr-6567 (September 6, 1973), rev'd ___ N.C. ___, ___S.E.2d ___; N.C. Sup. Ct. No. 36 (Robeson) (May 15, 1974); State v. Spicer, New Hanover County Superior Ct., No. 73-Cr-8034 (September 12, 1973), rev'd ___ N.C. ___, ___S.E.2d ___, N.C. Sup. Ct. No. 25 (Hanover) (May 15, 1974); State v. Ward, Edgecombe County Superior Ct., No. 73-Cr-6706 (September 19, 1973); State v. Fowler, __ N.C. __, 203 S.E.2d 803 (1974); State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974); State v. Bell, Robeson County Superior Ct., No. 73-Cr-12351 (October 18, 1973); State v. Sparks, Guilford County Superior Ct., No. 73-Cr-19776 (November 1, 1973); State v. Anthony Carey, Mecklenburg County Superior Ct., No. 73-Cr-46179 (November 8, 1973); State v. White, Alamance County Superior Ct., No. 73-Cr-12672 (December 6, 1973); State v. Brown, Edgecombe County Superior Ct., No. 72-Cr-7238 (December 9, 1973); State v. Hines, Edgecombe County Superior Ct., No. 73-Cr-7239 (December 9, 1973); State v. Walston, Edgecombe County Superior Ct., No. 73-Cr-7378 (December 9, 1973); State v. Albert Carey, Mecklenburg County Superior Ct., No. 73-Cr-6158 (December 11, 1973); State v. Vick, Beaufort County Superior Ct., No. 73-Cr-5687 (December 12, 1973); State v. Lampkins, Forsyth County Superior Ct., No. 73-Cr-43023 (January 19, 1974); State v. Pruitt, Cumberland County Superior Ct., Nos. 73-Cr-35545, 35546 and 35548 (January 29, 1974); State v. Williams, Wake County Superior Ct., No. 73-Cr-32521 (January 31, 1974); State v. Woods, Catawba County Superior Ct., Nos. 73-Cr-20546 and 20545 (January 28, 1974) State v. Patterson, Forsyth County Superior Ct., No. 73-Cr-22457 (February 5, 1974); State v. McCall, Transylvania County Superior Ct., Nos. 73-Cr-1828 and 1829 (February 9, 1974); State v. Avery, Beaufort County Superior Ct., No. 73-Cr-2247 (February 17, 1974);

1. Prosecutorial Discretion.

In North Carolina, the Solicitor is charged with the duty to "prepare the trial dockets [and] prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district," N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, State v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment, State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971); and see State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951). The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is State v. Casey, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that

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28/ cont'd.

State v. McLaughlin, Robeson County Superior Ct., Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231, 74-Cr-232 (February 28, 1974); State v. Burns, Onslow County Superior Ct., No. 74-Cr-1012 (March 1, 1974);

there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The Court rejected this contention, commenting that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And the majority opinion in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that either the Eighth or the Fourteenth Amendment required any limitation of the unfettered discretion of the Solicitor: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

Without any guidance whatsoever, then, a Solicitor is free to make the decision whether an indictment will be sought for first or second degree murder, or rape or assault to rape. He may thus "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, at 314 (Mr. Justice White concurring). This prosecutorial discretion doubtless accounts in considerable part for the striking fact, for example, that there have been only two convictions[29] for

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29/ State v. Poole, Moore County Superior Ct., No. 73-Cr-2710 (August 17, 1973), rev'd ___ N.C. ___, 203 S.E.2d 786 (April 10, 1974). State v. Henderson, Alamance County Superior Ct., No. 73-Cr-7771 (September 5, 1973), aff'd 285 N.C. 1, 203 S.E.2d 10 (March 13, 1974), petition for cert. filed, June, 1974 (No. 73-). The petitioner in Henderson was also convicted and sentenced to die for the crime of rape.

first degree burglary during the past year of Waddell's implementation in a State where there were about forty convictions annually for this crime in the recent past,[30] and where 39,210 "burglaries and housebreakings" were reported in 1972.[31] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions despite clear evidence of this crime.

A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under the regime of Waddell. In State v. Spicer, N.C. Sup. Ct., No. 25 (New Hanover), decided May 15, 1974, two persons were tried and convicted for murder during the course of an armed robbery.[32] A third person, one Brailford, had helped plan the

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30/ In 1955, the North Carolina Department of Justice ceased keeping separate statistics for persons convicted of First Degree Burglary and Second Degree Burglary. The Biennial Report of the Attorney General, Vol. 32 at 515, reveals that in 1952, there were 47 convictions for First Degree Burglary (with 15 "Other Dispositions" of First Degree Burglary charges); in 1953, there were 33 convictions for this crime, with 10 "Other Dispositions," ibid.; in 1954, there were 35 convictions and 26 "Other Dispositions," ibid., Vol. 33 at 377.

31/ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 1972 (Aug. 1973) at 74. The FBI Uniform Crime Report statistics reflect reported crimes, not convictions, and the reported "burglaries and housebreakings" are not necessarily equivalent to the total number of statutory First Degree Burglaries which occurred in the State during 1972.

32/ The conviction of Isaac Monk, also found guilty of first degree murder and sentenced to death in this incident, is pending on appeal in the North Carolina Supreme Court. Monk v. State, New Hanover County Superior Ct., No. 73-Cr-6476 (August 24, 1973).

robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." Id., slip op. at 9. The Court thus described Brailford's role in the crime:

> "[T]he State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated that he expected his cut . . . . The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Id., supra, at 10-11.

2. Plea Bargaining.

Under the Waddell procedures, there is no limit on the power of a Solicitor to accept a plea of guilty to a lesser included offense by a defendant charged with a capital crime, or to nol pros a capital indictment entirely. It is unclear how much plea bargaining in capital cases occurs in North Carolina,[33/] but the critical point is that it is utterly unregulated: the discretion of a Solicitor to accept a plea to a lesser offense in a capital case being quite as untrammelled as the freedom of a jury to recommend mercy in a pre-Waddell capital case. One instance of that discretion is State v. Wiggins, Bertie County Superior Ct., No. 73-Cr-2383, in which a 14 year old defendant was indicted for the rape of a nine year old girl, a potentially capital offense. On February 19, 1974, the defendant was permitted to enter a guilty plea to charges of assault with intent to rape and of assault with intent to kill, and received sentences of fifteen years and five years.

33/ Guilty pleas are said to account for up to 90% of all criminal convictions in the United States. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

Such cases doubtless reflect the long-recognized function of plea bargaining under a purportedly "mandatory" sentencing statute: it "provides the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[34/]

34/ Heath, "Plea Bargaining -- Justice Off the Record," 9 WASHBURN U.L. REV. 430, 455 (1970).

3. Jury Discretion

Even when a North Carolina jury has no admitted sentencing discretion, it still retains power to spare a capital defendant's life by finding him guilty of a lesser included offense. If there is any evidence to support the finding of such an offense, a defendant may demand a lesser-included-offense instruction as a matter of right.[35] N.C. Gen. Stat. §15-170 provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of any attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime . . . ."

35/ "If . . .there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." State v. Knight, 284 N.C. 384, 391, 103 S.E.2d 452, 456 (1958) (quoting State v. Spivey, 151 N. C. 676, 686, 65 S.E. 995, 999 (1909)); State v. Childress, 228 N.C. 208, 45 S.E.2d 42 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, State v. Hicks, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Roseman, 279 N.C. 573, 184 S.E.2d 289 (1971); State v. Griffin, 280 N.C. 142, 185 S.E.2d 149 (1971); State v. Brown, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); State v. Cox, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934). However, if such a charge is given and if a defendant is convicted of the lesser included offense, the conviction will nevertheless be affirmed on appeal, even if it appears irrational on the facts of the case. See State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), and discussion, infra.

And N.C. Gen. Stat. § 15-169 provides that:

> "[o]n the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

The right to a lesser-included-offense charged is considered so important in North Carolina that its omission is held to be reversible error even when the defendant fails to request such a charge. State v. Wagoner, 249 N.C. 637, 107 S.E.2d 63 (1959); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970). See State v. Moore, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); State v. DeGraffenreid, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). The Supreme Court of North Carolina has frequently reversed convictions for capital offenses 36/ because the trial court failed to give a charge on second degree murder, 37/ voluntary

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36/ The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

37/ State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Knight, 284 N.C. 384, 103 S.E.2d 452 (1958). When the State attempts to prove "Willful, deliberate and premeditated killing," N.C. Gen. Stat. § 14-17, which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. § 15-172, and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." State v. Todd, 264 N.C. 524, 529, 142 S.E.2d 154, 158 (1965). See also, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

manslaughter,[38] or involuntary manslaughter[39] in first degree murder cases, or because it failed to charge on assault with intent to rape in rape cases.[40]

Moreover, a jury may be charged on a lesser included offense where there is no evidence to support such a charge, and a conviction for the lesser offense will be sustained on appeal.[41]

38/ State v. Merrick, 171 N.C. 788, 88 S.E. 501 (1916); State v. Robinson, 188 N.C. 764, 125 S.E. 617 (1924); State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959). Cf. State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

39/ State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971). Cf. State v. Denny Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Joe Freeman, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

40/ State v. Williams, 185 N.C. 685, 116 S.E. 736 (1923). See also, State v. Green, 246 N.C. 717, 100 S.E.2d 52 (1957); State v. Roy, 233 N.C. 558, 64 S.E.2d 840 (1951); State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Webb, 20 N.C. App. 199, 200 S.E.2d 840 (1973). Cf. State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 116-118 (1972) (Bobbitt, CJ, dissenting). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." State v. Green, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

41/ The Supreme Court of North Carolina has occasionally disapproved of this practice, State v. Bryant, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); State v. Allen, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Bryson, 173 N.C. 803, 92 S.E. 698 (1917). In State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In State v. Quick, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "Suppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." 42/

42/ "An error on the side of mercy is not reversible . . . ." State v. Fowler, 151 N.C. 731, 66 S.E. 567 (1909). Accord: State v. Rowe, 155 N.C. 436, 71 S.E. 332, 337 (1911); See also State v. Ratcliff, 199 N.C. 9, 153 S.E. 605, 606 (1930); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); State v. Vestal, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); State v. Hall, 214 N.C. 639, 200 S.E. 375 (1939).

In State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "If we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then . . . [and] [w]hen they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

To insure that the jury is aware of the consequences of its decision in a capital case, the Supreme Court of North Carolina recently ruled that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence . . . sufficient compelling reason exists to justify . . . informing the jury of the consequences of their possible verdicts." State v. Britt, N.C.Sup.Ct., No. 36 (Robeson), decided May 15, 1974, [Appendix D, infra] slip op. at 16. The Court also ruled that "[c]ounsel may, in his argument to the jury, in any cse, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged . . . .[He may] in his argument to the jury . . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." Id. at 17-18. This holding implements the power of the jury to avoid imposing the death penalty in a

sympathetic case, either by convicting of a lesser included offense or by returning a verdict of not guilty.[43/] Thus, under North Carolina law, a double level of discretion may affect the jury's choice of a life or death verdict in a case where all the evidence points to guilt of a capital offense or of nothing: the trial judge has discretion to submit such lesser offenses, and the jury has discretion to commit for them.

43/ Wicker, "Christmas on the New Death Row," New York Times, Dec. 25, 1973, p. 18, col. 1:

> "Raleigh, N.C. Dec. 24 . . . In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; . . . Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

4. Executive Clemency.

The North Carolina Constitution provides that:

> [T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. Article III, §5(6).

Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of two hundred thirty-five (235) of three hundred fifty-eight (358) condemned prisoners were commuted. The chief executive has thereby commuted 65.6 percent of the death sentences imposed in the State over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature the right to prescribe the "manner of applying for pardons" but leaves the grant or denial subject only to "such conditions as [the Governor] may think proper." Indeed, the Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> [i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

Under a procedural system in which the death penalty is purportedly "mandatory," the clemency authority has commonly functioned as the aspect of the criminal justice system that responds to "mitigating factors" -- factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the exaction of punishment.[44/] A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations or death sentences after the 1947 and 1949 statutory amendments giving juries the option of imposing life sentences for the four crimes which had theretofore carried mandatory death penalties.[45/] By withdrawing that option from juries in 1973, the Waddell decision obviously displaced, but equally obviously did not reduce, the operation of discretionary selectivity in North Carolina's death-sentencing practices.

44/ Note, Executive Clemency in Capital Cases, 39 N.Y.U.L.REV. 136, 165-166 (1964).

45/ Johnson, Selective Factors in Capital Punishment, 36 SOCIAL FORCES, 165, 166-7 (1957). Behre notes that while 64 percent of condemned persons escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38 percent for the period between 1949 and 1962. Undoubtedly, a large proportion of condemned persons who avoided the death penalty did so by commutation. BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3. (North Carolina Office of Corrections, September 1973).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher" 46/ even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment,[48] and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons--who were, for the most part, members of[50]

49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

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powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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50/ (Cont'd)
ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which [illegible] appears upon inspection of the highly reliable [illegible]tions maintained by the Federal Bureau of Pr[illegible]. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were [illegible] during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

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death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man. Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll. As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).